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No. 01-1368

In the

Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, *et al.*,
Petitioners,

v.

WILLIAM HIBBS, *et al.*,
Respondents.

On Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF RESPONDENTS WILLIAM HIBBS, *et al.*

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INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights under Law (the "Lawyers' Committee"), The National Asian Pacific American Legal Consortium ("NAPALC"), and The National Association for the Advancement of Colored People ("NAACP") submit this brief as *amici curiae*, with the consent of the parties,[1] in support of Respondents' argument that § 2612(a)(1)(C) of the Family and Medical Leave Act of 1993 ("FMLA") was validly enacted pursuant to Congress's power under § 5 of the Fourteenth Amendment.

The Lawyers' Committee was formed in 1963 at the request of President Kennedy in order to involve private attorneys throughout the country in the national effort to ensure the civil rights of all Americans. Toward that end, the Lawyers' Committee has been involved as *amicus curiae* or counsel in several cases before this Court involving the scope of Congress's legislative power under the Civil War Amendments to remedy the effects of racial discrimination. *See, e.g., Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001); *Lopez v. Monterey County*, 525 U.S. 266 (1999).

NAPALC is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus and the Asian Pacific

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their staffs, or their counsel made a monetary contribution to the preparation of submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing interest in addressing matters of discrimination that have an impact on the Asian Pacific American community, and this interest has resulted in NAPALC's participation in a number of *amicus* briefs before the courts.

The NAACP is a non-profit membership corporation that traces its roots to 1909 and was chartered by the State of New York. The NAACP supports the rights guaranteed by the Fourteenth Amendment and Congress's power under § 5 of that Amendment to pass legislation that in certain circumstances abrogates state sovereign immunity. Accordingly, the NAACP joins the other *amici* in filing this brief and urging affirmance of the decision below.

This Court's interpretation of the scope of Congress's power to enforce the Fourteenth Amendment through its § 5 powers will directly impact the communities represented by these *amici*. Therefore, *amici* present their views on this extremely important issue.

SUMMARY OF ARGUMENT

Petitioner's argument rests on the mistaken premise that the standard of review applicable to legislation enacted under § 5 of the Fourteenth Amendment to remedy the effects of an historical pattern of unconstitutional discrimination against women is the same standard of review that the Court has recently applied under the rubric of "congruence and proportionality" to remedial legislation that was enacted to protect people with characteristics that the court *has not* previously recognized as having been the subject of a pattern of discrimination by the States. With regard to these latter

groups, such as the disabled, the Court has closely examined Congress's "remedial" efforts to ensure that they are "congruent and proportional" to a constitutional violation, and to ensure that Congress is enforcing the Fourteenth Amendment, rather than expanding its substantive guarantees.

As the Court has recognized, the concerns that have motivated this more searching inquiry do not exist when Congress exercises its powers to address the effects of discrimination on the basis of a classification that receives heightened scrutiny. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000). The Court developed heightened scrutiny in response to long and well-established histories of the States' unequal treatment of persons on the basis of certain characteristics, such as race and sex, and because distinctions based on race or sex are "seldom relevant to the achievement of any legitimate state interest" and often simply reflect "prejudice and antipathy." *Id.* at 83 (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985)). In light of the recognized histories of "difficult and intractable" effects of such discrimination, the Court has indicated that Congress may enact "powerful remedies" to eliminate State-sponsored discrimination and to prevent its recurrence in the future. *Id.* at 89.

When Congress invokes its authority under § 5, there can be no question that it does so pursuant to the substantive guarantees of the Fourteenth Amendment where it is acting against the backdrop of such widely recognized patterns of constitutional violations. Given the clarity of the constitutional basis for Congress's authority, the Court should defer to Congress's choices as to what constitutes "appropriate legislation" to remedy the effects of such unconstitutional discrimination. U.S. Const., amend. XIV, § 5. *See also Kimel*, 528 U.S. at 80-81 ("'It is for Congress in the first instance to determin[e] whether and what legislation

is needed to secure the guarantees of the Fourteenth Amendment.'" (quoting *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)). Thus, the more rigorous and less deferential standard of review that the Court has held to apply to cases involving groups without a documented, judicially recognized history of discrimination is not appropriate in the context of classifications that receive heightened scrutiny.[2] Rather, the Court should apply, as it has done with consistency, the deferential standard of review rooted in Chief Justice Marshall's seminal opinion in *McCulloch v. Maryland*, 4 Wheat 316 (1819), which requires only that § 5 legislation be a "rational means" of enforcing the Amendment's substantive guarantees. *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). Accordingly, even if the Court uses the rubric of "congruence and proportionality" in reviewing legislation that seeks to remedy discrimination subject to heightened scrutiny, such legislation should be deemed congruent and proportional if it meets the "rational means" standard.

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[2] Under the "strict scrutiny" standard applied to classifications based on race, such classifications "are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Kimel*, 528 U.S. at 84 (quoting *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 227 (1995)). Under the "intermediate scrutiny" standard, classifications based on gender will be upheld "only if they serve 'important governmental objectives and . . . the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). While the standard for racial classifications is thus more stringent, in both cases, the standards reflect the Court's recognition that discrimination on the basis of race or gender is presumptively a violation of the Fourteenth Amendment.

Here, the statute at issue, § 2612(a)(1)(C) of the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601 *et seq.*, responds to a pattern of unconstitutional discrimination, the existence of which the Court has long and repeatedly acknowledged – specifically, the States' restriction of women's participation in the workforce and creation of stereotypes that reinforced such discrimination. The proper standard for review of this legislation, therefore, is the deferential "rational means" test of *McCulloch*, which this legislation satisfies.

In arguing that the Court's more rigorous *Kimel* standard of review has no application to the legislation involved here, *amici curiae* do not wish to be understood to embrace that standard as proper for review of any legislation enacted by Congress, which, in its judgment, is appropriate to enforce the Fourteenth Amendment. In addition to the reasons discussed in the dissenting opinions in *Kimel* and *Bd. of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), *amici* respectfully submit that this standard, as applied in recent cases, is premised on an unworkable view of the legislative process, effectively requires Congress to dramatically alter the way in which it legislates, and threatens to violate separation of powers principles by imposing judicial requirements upon Congress's legislative procedure. We, therefore, urge the Court to reconsider the "congruence and proportionality" standard as applied in cases like *Garrett* and *Kimel* and return to the *McCulloch* standard, which, until recently, had been the standard the Court applied to legislation enacted by Congress under the express powers conferred upon it by the Constitution.

ARGUMENT

I. IN REVIEWING THE EXERCISE OF CONGRESS'S POWER TO REMEDY THE EFFECTS OF DISCRIMINATION AGAINST WOMEN, THE COURT SHOULD APPLY THE SAME "RATIONAL MEANS" STANDARD THAT IT HAS CONSISTENTLY APPLIED TO § 5 LEGISLATION ADDRESSED TO THE INTRACTABLE EFFECTS OF A LONG HISTORY OF UNCONSTITUTIONAL DISCRIMINATION

A. The Congruence and Proportionality Test Employed in *Kimel* and *Garrett* Does Not Apply When Congress Acts to Remedy Discrimination Against Groups Protected by Heightened Scrutiny

While, for the reasons discussed in Part II of this brief, *amici curiae* respectfully disagree with the standard of review of § 5 legislation reflected in cases such as *Kimel* and *Garrett*, the Court need not reach that issue here. For this case involves Congress's power under the Fourteenth Amendment to enact legislation respecting conduct of the States to which "heightened scrutiny" applies, and which this Court has distinguished from legislation like that involved in *Kimel* and *Garrett* proscribing conduct that was subject merely to "rational basis" review.

Unlike the legislation at issue in *Kimel* and *Garrett*, the statute involved here was enacted against the backdrop of the well-known, long history of unconstitutional discrimination against women by the States. *See* 29 U.S.C. § 2601(5) (finding that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such

responsibility affects the working lives of women more than it affects the working lives of men"); *infra* at 15-17. As this Court has long acknowledged, women, like racial minorities, have suffered a "history of purposeful unequal treatment." *Kimel*, 528 U.S. at 83. Accordingly, discrimination against such groups is presumptively unconstitutional, except in the unusual case where it could overcome heightened scrutiny. In reviewing legislation enacted under § 5 to remedy the effects of such discrimination in the race context, this Court has consistently applied the deferential standard of review derived from *McCulloch v. Maryland*, which the Court has interpreted to require only that the legislation chosen by Congress be a "rational means to effectuate" the rights that the Civil War Amendments guarantee. *South Carolina v. Katzenbach*, 383 U.S. at 324.

Recently, this Court has gone beyond the *McCulloch* standard and applied a more rigorous standard of review to congressional legislation only in cases where the groups that Congress sought to protect had not heretofore been recognized by the Court as having a history of purposeful unequal treatment. Although in *United States v. Morrison*, 529 U.S. 598 (2000), the Court, in *dicta*, used the terms "congruence" and "proportionality" in a discussion of the fit between the relevant provision of the Violence Against Women Act ("VAWA") and the injury it was intended to remedy, *Morrison*, 529 U.S. at 625-26, the *Morrison* holding with respect to § 5 was that VAWA was an unconstitutional exercise of Congress's powers because it was not directed "at any State actor, but at individuals who . . . committed criminal acts motivated by gender bias." *Id.* at 626. Thus, there is no tension between the holding in *Morrison* and the observations of the Court that groups like those involved in *Kimel* and *Garrett* are "unlike those who suffer discrimination on the basis of race or gender," and have not been subjected

to a "history of purposeful unequal treatment." *Kimel*, 528 U.S. at 83.

As the Court has emphasized, differential treatment by the States on the basis of such classifications is subject only to "rational basis" review, under which the constitutionality of the use of the classification is presumed, except in cases where no rational basis for the discrimination can be discerned. As noted, in *Kimel*, the Court explicitly distinguished the legislation before it on this ground, observing that "[a]ge classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and apathy," and that the elderly, "again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment.'" *Kimel*, 528 U.S. at 83 (citations omitted). Similarly, in *Garrett*, the Court found it significant that it had previously determined that disability did not "qualif[y] as a 'quasi-suspect' classification," and hence, was subject only to rational basis review. *Garrett*, 531 U.S. at 366, 367 (noting that under rational basis review, "the burden is upon the challenging party to negative 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'") (citations omitted). Thus, the Court in both *Kimel* and *Garrett* found it ambiguous whether the legislation at issue could "be understood as responsive to, or designed to prevent, unconstitutional behavior." *Kimel*, 528 U.S. at 86 (citing *City of Boerne*, 521 U.S. at 532). *See also Garrett*, 531 U.S. at 366. For that reason, the Court more closely reviewed the legislative record for evidence of widespread constitutional violations requiring a remedy under § 5.

No such ambiguity exists where Congress legislates against the intractable effects of racial and gender discrimination. First, unlike the discrimination at issue in *Kimel* and *Garrett*, discrimination on the basis of race or gender is subject to heightened scrutiny by this Court for purposes of the Equal Protection Clause. Because under heightened scrutiny, the burden of proving a nondiscriminatory purpose rests upon the State, *see United States v. Virginia*, 518 U.S. 515, 533 (1996) (gender); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (race), such discrimination is presumed to violate the Equal Protection Clause. In other words, the Court has recognized that where racial and gender discrimination occurs, it usually violates the Fourteenth Amendment and thus, calls for a remedy under § 5.

Second, both racial and gender discrimination have long been acknowledged *by the Court* to have a "history of purposeful unequal treatment." *Kimel*, 528 U.S. at 83; *infra* at 15-17. In contrast, the lack of such "judicial documentation" in *Garrett* convinced at least two Justices that the Americans with Disabilities Act was beyond Congress's § 5 power. *Garrett*, 531 U.S. at 375-76 ("If the States had been transgressing the Fourteenth Amendment . . ., one would have expected to find in decisions of the States and . . . the United States extensive litigation and discussion of the constitutional violations.") (concurring opinion of Kennedy, J., joined by O'Connor, J.). By contrast, in the case of classifications on the basis of race or gender, the pattern of unconstitutional conduct that was found wanting in *Kimel* and *Garrett* has been repeatedly acknowledged by the Court itself, eliminating any ambiguity, from the outset, as to whether Congress has an appropriate basis upon which to invoke its remedial authority under § 5.

In sum, because the Court's equal protection jurisprudence has already established that racial and gender discrimination are presumptively unconstitutional and reflect an historic pattern of unconstitutional conduct, the need that the Court perceived in cases such as *Kimel* and *Garrett* to go beyond the *McCulloch* standard and closely review the legislative record does not arise.

B. This Court Reviews § 5 Legislation Enacted to Remedy the Effects of Discrimination against Groups Protected by Heightened Scrutiny under the Deferential "Rational Means" Standard Derived from *McCulloch* v. *Maryland*

Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const., amend. XIV, § 5. Section 5 "is an affirmative grant of power to Congress." *Kimel*, 528 U.S. at 80. Thus, "'[i]t is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.'" *Id.* at 80-81 (quoting *City of Boerne*, 521 U.S. at 536). Accordingly, when legislating under § 5, Congress is not limited to proscribing conduct that violates the Fourteenth Amendment, but rather, is empowered "to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81 (citing *City of Boerne*, 521 U.S. at 518). *Accord Garrett*, 531 U.S. at 365 (citations omitted).

As the Court has long recognized, the Framers of the Fourteenth Amendment intended to give Congress the same broad powers of the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, in determining "whether and what legislation is needed" to secure the Amendment's guarantees.

See Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (citing *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)). Thus, the "measure of what constitutes 'appropriate legislation' under § 5" is the broadly deferential standard of review articulated by Chief Justice Marshall in *McCulloch v. Maryland*.[3] *Katzenbach v. Morgan*, 384 U.S. at 650-51 (quoting *McCulloch*, 4 Wheat at 421). *See also South Carolina v. Katzenbach*, 383 U.S. at 326-27 (holding that the *McCulloch* standard is "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment," as in "all cases concerning the express powers of Congress with relation to the reserved powers of the States."); Evan H. Caminker, *"Appropriate" Means-Eds Constraints on Section 5 Power*, 53 Stan. L. Rev. 1127, 1134-43 (2001).

The Court has interpreted the *McCulloch* standard to require only a rational relationship between the ends of the legislation and Congress's chosen means. The desirability of the legislation as a policy matter, or the extent to which Congress might have chosen other, more narrowly tailored means, are beyond the scope of the Court's review. Hence, "[i]f it can be seen that the means adopted are readily calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone." *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934) (citation omitted). This deferential standard is mandated by

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[3] In the famous words of Chief Justice Marshall: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 4 Wheat at 421.

the concept of separation of powers so fundamental to our constitutional structure. As the Court has acknowledged, any further scrutiny of legislation that Congress has deemed necessary and proper "would be to pass the line which circumscribes the judicial department and to tread upon legislative ground." *James Everard's Breweries v. Day*, 265 U.S. 545, 559 (1924) (citing *McCulloch*, 4 Wheat. at 423).

The deference due to Congress's exercise of the legislative power expressly conferred on it by § 5 is surely entitled to at least the same deference accorded by this Court in determining whether congressional legislation (other than legislation discriminating on the basis of suspect classifications) violates the equal protection principles of the Fifth Amendment. In the latter context, the Court has held:

> we never require a legislature to articulate its reasons for enacting a statute, [and] it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . Thus, the absence of "legislative facts" explaining the distinction "on the record" . . . has no significance in rational-basis analysis. . . . In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. . . . Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.

FCC v. Beach Communications, 508 U.S. 307, 315 (1993) (reviewing federal Cable Communications Policy Act of

1984) (citing cases). *See also Heller v. Doe by Doe*, 509 U.S. 312, 319-21 (1993).

From the very outset, the powers conferred on Congress in enacting "appropriate legislation" under the Civil War Amendments have been reviewed under the deferential *McCulloch* standard. As the Court held over a century ago:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-46 (1879). Consistent with the principles of the *McCulloch* standard discussed above, the Court has determined that legislation enacted under the Civil War Amendments need only be a "rational means to effectuate" the rights that the Amendments contain. *South Carolina v. Katzenbach*, 383 U.S. at 324. The Court has repeatedly affirmed the applicability of the *McCulloch* standard to legislation enacted under the Amendments to remedy racial discrimination. *See City of Rome v. United States*, 446 U.S. 156, 175 (1980); *Oregon v. Mitchell*, 400 U.S. 112, 284 (1970); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-44 (1968); *Katzenbach v. Morgan*, *supra*, 384 U.S. at 650; *South Carolina v. Katzenbach*, 383 U.S. at 326-27.

Thus, the Court has unanimously held that Congress is empowered to enact antidiscrimination legislation that applies to the entire Nation without evidence that the discrimination

sought to be remedied exists in every State, because, among other reasons, "nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country." *Oregon v. Mitchell*, 400 U.S. at 284 (upholding nationwide ban on literacy tests under Voting Rights Act Amendments of 1970) (opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.).

The Court's most comprehensive articulation of the standard to be applied to legislation enacted under § 5 of the Fourteenth Amendment appears in *Katzenbach v. Morgan*, *supra*. There, the Court held that § 4(e) of the Voting Rights Act of 1965, which forbade States from denying the vote to covered persons on the ground of inability to read or write English, was proper § 5 legislation, notwithstanding the Court's previous determination that literacy tests in themselves are not unconstitutional. *See Katzenbach v. Morgan*, 384 U.S. at 643-44, 646. Consistent with the *McCulloch* standard, the Court did not rely on whether Congress had amassed evidence of the need for the provision or whether § 4(e) was sufficiently tailored to minimize intrusion upon the sovereignty of the States. Rather, the Court noted that the only relevant considerations on its review were: "whether § 4(e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is 'plainly adapted to that end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" *Id.* at 651.

Applying these factors, the Court found that the provision "may be regarded as an enactment to enforce the Equal Protection Clause" because it "may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government." *Id.* at 652. In addition, it could be "readily seen as 'plainly

adapted' to furthering the aims of the Equal Protection Clause" because its "practical effect" was to prohibit New York from denying the right to vote for members of that group, which would "be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community." *Id.* Moreover, the Court emphasized that the wisdom of Congress's legislative judgment – including the extent of the discrimination that Congress sought to remedy and the necessity of enacting § 4(e) to eradicate that discrimination – was not a question for the Court. As the Court explained:

> It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations – the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement . . . . It is not for us to review the congressional resolution of these factors. *It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.*

Id. at 653 (emphasis added).

While the cases in which the Court has applied the *McCulloch* standard have all involved legislation addressing the effects of racial discrimination, the reasons for the Court's adherence to the *McCulloch* standard apply equally to laws addressed to the effects of discrimination by States against

women. As the Court has long recognized, like racial minorities, women have been the victims of a pattern of unconstitutional discrimination throughout the Nation's history. It is well established that "our Nation has had a long and unfortunate history of sex discrimination." *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)). Furthermore, "[w]hile the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, 'overpower those differences.'" *J.E.B. v. Alabama*, 511 U.S. 127, 135 (1994) (citation omitted). And, as in the case of racial discrimination, the Court has applied heightened scrutiny to any classifications based on gender because like race, gender is a classification that is rarely justified by any state interest. *See Frontiero*, *supra*, 411 U.S. at 686. Accordingly, the Court has recognized the appropriateness of prophylactic measures to remedy the continuing effects of the Nation's history of discriminatory treatment of women. *See Califano v. Webster*, 430 U.S. 313, 318 (1977) (*per curiam*) (upholding provision of Social Security Act allowing women greater old-age benefits as an enactment that "works directly to remedy some part of the effect of past discrimination" against women, "who as such have been unfairly hindered from earning as much as men.").

Among the forms of that discrimination has been the restriction by the States of women's participation in the workforce based on stereotypical "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (noting that "[h]istory provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed that women were less able than men to perform a particular function.") (citing cases). In

particular, the States gave legal status to the view that women were unfit for any role beyond family caregiver. *See, e.g.*, *Bradwell v. Illinois*, 16 Wall. 130, 141 (1872) (Bradley, J., concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."). The pervasiveness of this state-imposed stereotype is reflected in the abundance of case law documenting the States' exclusion of women from working life. *See Hibbs v. Nevada Dep't of Human Resources*, 273 F.3d 844, 861-64 (9th Cir. 2001) (examining numerous cases upholding discriminatory statutes limiting permissible hours during which women could work or barring women from particular lines of work altogether).

These laws were predicated on the same stereotypical rationale articulated by Justice Bradley in *Bradwell*, namely, to ensure that women were not distracted from "the proper discharge of the maternal functions" and "the maintenance of the home." *Hibbs*, 273 F.3d at 864 (citations omitted) (collecting cases). Notwithstanding the Court's application over the past three decades of heightened scrutiny to discriminatory state action based on gender, these stereotypes continue to exist and impede women's equal participation in the workplace. *See* Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. Rev. 707, 708 (2000) (concluding that "employers exact penalties on women . . . because of the presumption that women will leave the workforce when they have children.").[4]

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[4] In addition, we respectfully refer the Court to the brief of *amici curiae* NOW Legal Defense and Education Fund, *et al.*, for a more detailed examination of the history of the States' discrimination against women.

C. Even If the Court Requires Legislation Remedying the Effects of Discrimination Subject to Heightened Scrutiny to Be Congruent and Proportional, Such Legislation Should Be Held to Be Authorized by § 5 If It Meets the "Rational Means" Test

As discussed above, *amici* believe that *McCulloch* sets forth the proper analysis for determining whether Congress's actions to remedy the effects of discrimination subject to heightened scrutiny were appropriate legislation under § 5. Thus, even if the Court determines that the congruence and proportionality rubric applies to legislation enacted to remedy discrimination against women, *amici* submit that the *McCulloch* "rational means" test is the proper standard for the determination of whether such legislation is congruent and proportional. As we have shown, the circumstances surrounding the Court's application of a more searching standard of review than is appropriate under the *McCulloch* standard do not exist where Congress seeks to eradicate the effects of discrimination against protected classes such as women. Accordingly, § 5 legislation addressed to remedying the effects of gender discrimination is congruent and proportional if it is a rational means to accomplishing that purpose.

D. Section 2612(a)(1)(C) of the Family and Medical Leave Act May Be Viewed As a Rational Means of Remedying the Effects of Discrimination Against Women

In applying the *McCulloch* standard of review to § 2612(a)(1)(C), the Court should ask only whether the legislation addresses individuals protected by heightened scrutiny and, if so, whether Congress could have determined that it was a rational approach to addressing the problem. In this case, because there is no question as to the existence of a

pattern of unconstitutional gender discrimination, the only issue remaining for the Court is whether § 2612(a)(1)(C) is a "rational means" of combating the effects of the state-enforced gender stereotype discussed above. As noted, under this standard, "[i]t [is] for Congress . . . to assess and weigh the various conflicting considerations – the risk or pervasiveness of the discrimination . . ., the effectiveness of eliminating the [state action at issue] as a means of dealing with the evil, the adequacy of alternative remedies, and the nature and significance of the state interests that would be affected . . . ." *Katzenbach v. Morgan*, 384 U.S. at 653. Section 2612(a)(1)(C) clearly satisfies this standard.

By requiring employers to provide up to 12 weeks unpaid leave to care for family members on a gender-neutral basis, § 2612(a)(1)(C) assures that, at least in some cases, family leave will be taken by men. This serves both to break down the stereotype of women as primary caregivers and to allow spouses to allocate family caregiving responsibilities according to their own preferences, rather than the gender roles forced upon them by the States. Furthermore, as the Ninth Circuit correctly determined, § 2612(a)(1)(C) is a rational means of counteracting any tendency on the part of employers to view women as less desirable job candidates than men because of the state-sponsored perception that they will require more time off to tend to their families. *See Hibbs*, 273 F.3d at 867.

Petitioner's view of the ends that Congress addressed in the family leave provision of FMLA is unduly narrow. Pet. Br. at 30-35. The issue is not whether States have had a pattern of discriminatory leave policies or whether many States have family leave policies that are at least as generous as that provided under § 2612(a)(1)(C). As noted, the federal leave policy can reasonably be seen as a means of eradicating the effects and stereotypes engendered by a long history of

state-sponsored discrimination, which clearly falls within its § 5 powers. *See City of Rome*, *supra*, 446 U.S. at 176; *South Carolina v. Katzenbach*, *supra*, 400 U.S. at 319-20. Moreover, notwithstanding the existence of state leave policies, Congress could rationally have concluded that uniform, nationwide minimum standards are desirable to remedy the pervasive gender stereotypes created by the Nation's history of state-sponsored discrimination. *See Oregon v. Mitchell*, 400 U.S. at 284.

In sum, as this Court has recognized, the existence of a pattern of state discrimination on the basis of gender can be presumed. Hence, even if the congruence and proportionality test applies, legislation adopted by Congress to address the effects of such discrimination is "congruent and proportional" if it can be discerned that the legislation is a "rational means" to address those effects. Here, § 2612(a)(1)(C) "may be viewed" as a rational means of enforcing the Equal Protection Clause, and is therefore valid legislation under § 5. *Katzenbach v. Morgan*, 384 U.S. at 652.

II. THE COURT SHOULD RECONSIDER THE MORE RIGOROUS STANDARD OF REVIEW THAT IT HAS RECENTLY APPLIED TO § 5 LEGISLATION TO DETERMINE CONGRUENCE AND PROPORTIONALITY

We have shown above that the standard of review employed to determine congruence and proportionality in cases like *Kimel* and *Garrett* does not apply to legislation, like the legislation before the Court, aimed at remedying the effects of gender discrimination. We also respectfully urge the Court, however, to reexamine the standard of review it has recently applied in cases such as *Kimel* and *Garrett* and return to a more deferential standard in evaluating the validity of all legislation Congress seeks to enact under its § 5 powers.

In *City of Boerne* and subsequent cases, the Court has continued to recognize that it should defer to Congress's judgments and that "[i]t is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Kimel*, 528 U.S. at 80-81 (quoting *City of Boerne*, 521 U.S. at 517). Nevertheless, in applying the "congruence and proportionality" standard, the Court has closely scrutinized the legislative record for evidence of a "pattern" of unconstitutional state discrimination, insisted that attempts to deal with such discrimination on a uniform, national basis be supported by evidence in the record, and questioned the quality of the evidence that is reflected in the record and the inferences that Congress was entitled to draw from it.

Respectfully, we submit that this approach is inconsistent with the principle of separation of powers and unduly intrudes on Congress's legislative function. As noted, this Court has emphasized that

> [a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. . . . Only by faithful adherence to this guiding principle is it possible to preserve to the legislative branch its rightful independence and its ability to function.

FCC v. Beach Communications, *supra*, 508 U.S. at 315 (citations omitted). Yet, in determining "congruence and proportionality" in cases such as *Kimel* and *Garrett*, the Court has required that Congress indicate the "reasons for [its] action" in the legislative record and support those "reasons" with evidence of the necessity of § 5 legislation. *Kimel*, 528 U.S. at 88. The Court thus appears to have imposed an

evidentiary standard more appropriate to an administrative agency than a coordinate branch of the Federal Government. *See Garrett*, 531 U.S. at 376 (dissenting opinion of Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ.).

Moreover, the Court appears to have limited the inferences that Congress may draw through the use of common sense from the information it has received from multiple sources. For example, in *Garrett*, this Court held that substantial evidence of society-wide stereotypes concerning the disabled, and even discrimination by government officials of municipalities, were not a sufficient basis for Congress to infer that state officials were as likely to hold the same stereotypes and prejudices that affected or were likely to affect their treatment of the disabled. *See Garrett*, 531 U.S. at 377-78 (opinion of Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.). And the requirement of a record showing a pattern of discriminatory state action also implies that Congress's power "to enforce" the Fourteenth Amendment limits it to legislation remedying past conduct that can be reflected in a record and precludes it from legislating prophylactically to protect against incipient or potential conduct that threatens to undermine the guarantees of the Fourteenth Amendment. *See* John T. Noonan, Jr., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 93 (2002).

With all respect, we believe that the Court's standard of review in these cases not only violates the separation of powers by imposing judicial requirements upon Congress's legislative procedure, but also reflects an unworkable view of the legislative process and, in effect, calls upon Congress to dramatically alter the way in which it legislates.

First, the Court's apparent requirement that Congress articulate a single, coherent policy rationale and support that

rationale with evidence in the legislative record does not accord with the reality of the legislative process. Members of Congress represent constituencies with diverse, often conflicting, interests. Hence, legislation is rarely, if ever, reached through consensus, but rather, through competition and majority vote. *See* Philip P. Frickey & Steven S. Smith, Essay, *Judicial Review, The Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L.J. 1707, 1741-45 (2002). Moreover, legislation is generally the product of a competitive process of bargaining and coalition-building as opposed to rational deliberation. Accordingly, in many, if not most, cases, no specific, identifiable rationale exists. *See id.* at 1744-45.

In addition, the Court's requirement of an evidentiary predicate in the legislative record mistakenly assumes that all the information upon which Congress draws in enacting legislation is incorporated in that record. Congress is informed through numerous sources that are not reflected in the legislative record. For example, Members of Congress bring to the legislature the views and experiences of the citizens whom they represent. Thus, unlike a trier of fact in a court or an administrative law judge, Congress is not a "*tabula rosa* until it conducts on-the-record proceedings," but rather, "grounds its claim to legitimacy on knowledge of and accountability to the citizens it represents." A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 Cornell L. Rev. 328, 385-86 (2001). In addition, Congress acquires information from, inter alia, communications with interest groups, information support services such as the General Accounting Office and the Congressional Research Service of the Library of Congress, written materials from party leadership offices, members' caucuses, legislators' personal staffs, and

communications with the executive branch. *See id.* at 384-87; Frickey & Smith, *supra*, at 1734-36.

Thus, among the branches of the Federal Government, Congress is uniquely capable of amassing information from a wide range of sources, both during and outside of its formal proceedings. Reliance on the legislative record alone is therefore an incomplete measurement of the basis for Congress's judgments. More significantly, however, it appears that if Congress is to satisfy the congruence and proportionality test as applied in cases like *Kimel* and *Garrett*, it must painstakingly catalogue the information acquired from such extra-record sources in the legislative record. For the reasons discussed above, this would mark a dramatic alteration of Congress's legislative procedure.

Furthermore, by requiring Congress to adhere to judicially imposed procedural requirements when it legislates, the Court's application of the congruence and proportionality test conflicts with at least the spirit of a number of constitutional provisions that limit judicial intrusion into the legislative sphere. These include the Rules and Journal Clauses of Article I, which provide respectively that "[e]ach House may determine the Rules of its Proceedings" and "shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require secrecy." U.S. Const. art. I, § 5, cl. 2, 3. The Court has interpreted both of these provisions as giving Congress wide discretion to determine how to report and record its consideration of legislation. *See, e.g.*, *United States v. Ballin*, 144 U.S. 1 (1892); *Field v. Clark*, 143 U.S. 649 (1892).

The more demanding standard of review applied in cases such as *Kimel* and *Garrett* also appears to conflict with the Speech or Debate Clause, which provides that "for any

Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The Court has determined that one of the Speech or Debate Clause's chief purposes is "to insure that the legislative function the Constitution allocates to Congress may be performed independently" and "reinforc[e] the separation of powers so deliberately established by the Founders." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). *See also Gravel v. United States*, 408 U.S. 606, 628-29 (1972) (holding that Speech or Debate Clause prohibited court from inquiring into conduct of, or preparation for, congressional proceeding); Bryant & Simeone, *supra*, at 376-83.

We understand the Court's approach, first articulated in *City of Boerne* and applied in cases like *Kimel* and *Garrett*, to reflect two concerns: first, that in the absence of a judicially recognized history of state discrimination, Congress actually may be seeking to expand the substantive scope of the Fourteenth Amendment or is adopting a remedy that is disproportionate to the number of instances of unconstitutional state conduct; and second, that in such circumstances, there is a need to protect the sovereignty of the States against unwarranted intrusions by Congress in the guise of enforcing the Fourteenth Amendment. We respectfully submit that neither concern justifies the intrusion into the legislative process that application of the standard of review in cases like *Kimel* and *Garrett* has entailed.

In the absence of conduct involving a judicially recognized history of unconstitutional state action, this Court has limited itself to rational basis review in evaluating whether state conduct entails arbitrary and purposeful discrimination, in recognition of the Court's own fact-finding limitations and the deference due to democratically elected legislatures. But it is precisely because Congress, as a

democratically elected legislature, is not so limited that it is inappropriate to impose a rigorous standard of judicial review on Congress's determination of the existence or a threat of unconstitutional state conduct, even if not previously recognized by the Court. *See Garrett*, 531 U.S. at 382-85 (dissenting opinion of Breyer, J., joined by Stevens, Souter, and Ginsberg, JJ.); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 Yale L.J. 441, 467-73 (2000). As discussed above, in making legislative judgments, Congress relies on many sources of information and intuition that would not support a judicial or administrative determination, but which are characteristic of a democratic legislative process. The Fourteenth Amendment expressly assigns to Congress the task of enforcing its guarantees and, under the long tradition established by *McCulloch*, its judgments that there exists arbitrary and purposeful state discrimination requiring legislation, and what legislation is "appropriate" to enforce the Fourteenth Amendment's guarantees against such discrimination and its effects, deserve deference and respect.

We also submit that concerns that Congress may be unjustifiably intruding on state sovereignty do not support a more rigorous standard of review of Congress's legislative judgments under § 5. To begin with, as the Court has recognized, the Civil War Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976) (noting that the Amendments effected "the expansion of Congress's powers with the corresponding diminution of state sovereignty") (discussing *Ex parte Virginia*, 100 U.S. at 345-46). Moreover, the States are not an isolated minority requiring heightened judicial protection against a tyrannical majority. To the contrary, the political process and the structure of the Federal Government – in

particular, the States' equal representation in the Senate – were the principal means intended by the Framers to prevent inappropriate intrusions by the federal legislature on the States' sovereignty. *See Kimel*, 528 U.S. at 93-94 (dissenting opinion of Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.); *Garcia v. San Antonio Metro. Transp. Auth.*, 469 U.S. 528, 550-51 (1985).

In sum, the standard recently applied by the Court to determine congruence and proportionality substitutes the Court's views of how Congress should conduct its lawmaking processes in carrying out its duty to "enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]," and ultimately substitutes the Court's judgment for that traditionally left to Congress alone as to the "closeness of the relationship between the means to be adopted, and the end to be attained." *Burroughs v. United States*, *supra*, 290 U.S. at 547-48. This is a departure from the Court's historic recognition of its own institutional limitations and the deference due to the democratically elected legislative branch, except in cases where the Court's intervention is needed to protect the rights of individuals guaranteed by the Constitution and those "discrete and insular minorities" who do not have access to the democratic process to protect their rights against a dominant majority. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938). Accordingly, for the reasons discussed above, *amici curiae* respectfully urge the Court to reconsider the rigorous standard of review it has recently applied to determine congruence and proportionality, even in cases where the Court has not previously recognized a history of purposeful unequal treatment.

CONCLUSION

For the foregoing reasons, *amici curiae* The Lawyers' Committee for Civil Rights under Law, The National Asian Pacific American Legal Consortium, and The National Association for the Advancement of Colored People respectfully urge that the Court affirm the decision below.

Respectfully submitted,

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